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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 367

MORRIS MALINSKI AND SIDNEY RUDISH,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

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INDEX

	Page
Jurisdiction	1
Statement of the case	2
Questions involved	3
Certificate of Court of Appeals	3
Details of the crime	3
Indictment	4
Circumstances under which confession obtained	5
As to Rudish	11
Argument	13
Duty of the trial court	25
Defendants seasonally asserted violation of constitutional rights	29
As to failure to arraign without unnecessary delay	32
Controlling decisions	35,41
Conclusion	42
Appendix A	45
Appendix B	45
Appendix C	46
Appendix D	46
Appendix E	46
Appendix F	47
Appendix G	47
Appendix H	47
Appendix I	48

Cases Cited

Anderson v. *U. S.*, L. Ed. Adv. Op., Vol. 87, No. 10, 589	11,40
Ashcraft v. *Tennessee*, L. Ed. Adv. Op., Vol. 88, No. 14, 588	30,35,36,37
Berger v. *U. S.*, 295 U. S. 78	27
Betts v. *Brady*, 316 U. S. 455	31,41
Bram v. *U. S.*, 168 U. S. 532	14
Brown v. *Mississippi*, 297 U. S. 278	14,41
Canty v. *Alabama*, 309 U. S. 629	41
Chambers v. *Florida*, 309 U. S. 227	29,41
Lisenba v. *California*, 314 U. S. 219	29,41

	Page
Lomax v. *Texas*, 313 U. S. 544	41
Lyons v. *Oklahoma*, L. Ed. Adv. Op., Vol. 88, No. 16, 1076	14, 19, 37, 41
McNabb v. *U. S.*, L. Ed. Adv. Op., Vol. 89, No. 10, 579	38, 39, 40
N. Y. C. R. Co. v. *Johnson*, 279 U. S. 310	25
Northern Securities v. *United States*, 193 U. S. 197, 401	32
People v. *Conroe*, 200 N. Y. 356	26
People v. *Esposito*, 220 N. Y. 370	26
People v. *Fielding*, 158 N. Y. 542	26
People v. *Manganiro*, 218 N. Y. 9	26
People v. *Mull*, 167 N. Y. 247	26
People v. *Pantano*, 239 N. Y. 416	16, 27
People v. *Roper*, 259 N. Y. 170	43
People v. *Wolf*, 183 N. Y. 464	25
Pierre v. *Louisiana*, 306 U. S. 354	30, 41
United States v. *Mitchell*, L. Ed. Adv. Op., Vol. 88, No. 10, 529	28, 35, 40
Vernon v. *Alabama*, 313 U. S. 547	41
Vierck v. *U. S.*, L. Ed. Adv. Op., Vol. 87, No. 10, 529.	25
Ward v. *Texas*, 316 U. S. 547	30, 41
White v. *Texas*, 310 U. S. 530	31, 41

Constitutional Provisions and Statutes Cited

(These are printed in appendices)

U. S. Constitution, Amendment 14, Section 1	45
Judicial Code of the United States, Section 237 (b) as amended by the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; 28 U. S. C. A. Sec. 344 (b))	45
Section 595, U. S. Code of Criminal Procedure, Title 18, U. S. C. (1940 Ed., Vol. 2)	32, 47
Section 300A of Title 5, U. S. C. (1940 Ed., Vol. 1, p. 124)	47
N. Y. Penal Law, Section 1041	48
N. Y. Penal Law, Section 1844	9, 46
N. Y. Code of Criminal Procedure, Section 165	9, 46
N. Y. Code of Criminal Procedure, Section 399	5, 46
N. Y. Code of Criminal Procedure, Section 528	23, 47

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondents

BRIEF ON BEHALF OF PETITIONERS

On certiorari to the Court of Appeals of the State of New York.

The petitioners were convicted in the County Court of Kings County of the State of New York of the crime of murder in the first degree and sentenced to be put to death. The judgment was affirmed by the Court of Appeals.

Opinions Below

The two opinions written in the Court of Appeals of the State of New York are reported officially, 292 N. Y. 360. The denial of the motion for reargument is reported officially, 293 N. Y. 695.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of

February 13, 1925, c. 229, section 1 (43 Stat. 937); 28 U. S. C. A. Section 344 (b),[1] this being a proceeding to review the final judgment of the Court of Appeals of the State of New York rendered April 20, 1944, in which a decision could be had.

The judgment affirmed a judgment of death (Rec. pp. 91-92; 95-96); and in said Court of Appeals petitioners especially set up and claimed under the Fourteenth Article of Amendment of the Constitution of the United States,[1a] the right, privileges and immunity against being deprived by the State of New York of petitioners' rights and liberty without due process of law, "and this point was considered and necessarily decided by this Court", (292 N. Y. 686). This point having been specifically presented in the briefs on behalf of Malinski and Rudish, on the argument of the appeal from the judgment of conviction and death of the County Court of Kings County, New York State, and specifically in the trial.

Statement of the Case

The petitioners and one Joseph Indovino were convicted of murder in the first degree, in the County Court, Kings County, New York State, on July 19, 1943, and your petitioners were sentenced to be executed.[2] (Rec. pp. 91-92; 95-96).

The conviction was affirmed by the Court of Appeals by a divided Court.[3] The jury recommended life imprisonment for Indovino (Rec. pp. 1417), so that his case was not passed upon by the Court of Appeals, and is not involved here (292 N. Y. 360, 364).

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[1] Appendix B, *post* p. 45.

[1a] Appendix A, *post*, p. 45.

[2] A stay of execution was granted by Mr. Justice Jackson by order dated June 19, 1944, and continued by Order of the Court, dated October 9, 1944.

[3] The Court divided four to three.

A motion for a reargument in the Court of Appeals was denied without opinion June 14, 1944. (293 N. Y. p. 695).

There were two opinions written in the Court of Appeals. The prevailing opinion was by Judge Conway, concurred in by Judges Lewis, Desmond and Thatcher (292 N. Y. 360); a dissenting opinion was filed by Chief Judge Lehman and concurred in by Judges Rippey and Loughran (i. d., 376).

Questions Involved

The issues to be determined are:

(a) Were the circumstances under which a confession was obtained from Malinski and put in evidence a denial of due process under the Fourteenth Amendment?

(b) Did the conduct of the prosecuting attorney and his summation to the jury constitute such a violation of the fundamental concepts essential to a fair and impartial trial, as to constitute a denial of due process under the Fourteenth Amendment?

(c) Did the conduct of the judge, his charge, and his failure to charge fully and intelligently on certain phases of the case constitute a denial of due process under the Fourteenth Amendment?

Certificate of Court of Appeals

The amended remittitur of the Court of Appeals (292 N. Y. 686) explicitly recites that both Malinski and Rudish had raised questions under the Constitution of the United States, which had been presented to that Court and necessarily passed upon (292 N. Y. 686).

Details of the Crime

On February 15, 1941, at eleven o'clock, P. M., Leon Fox, a patrolman of the Police Force of the City of New York,

was shot and killed. At the time of the homicide he was escorting the manager of Loew's Theatre in Coney Island, Borough of Brooklyn, City and State of New York, to a bank depository. The manager had the day's receipts of the theatre, consisting of seven hundred dollars in bills, and seven rolls of quarters of ten dollars each in a burlap bag. As they approached the depository, a branch of the Brooklyn Trust Company, located at Surf Avenue and West 12th Street, Coney Island (Rec. pp. 127-128), they noticed an automobile parked on West 12th Street, south of Surf Avenue, with the lights out and the motor running. As they reached the vicinity of the car, they were "jumped" by one man, who came out of the automobile; the officer was shot; the bag containing the money taken; the man entered the car, which sped away at a high rate of speed. None of the occupants of the car, nor the participants in the robbery and killing were ever identified (Rec. pp. 129-132). The testimony against the defendants was given chiefly by David Yellin,[4] Nathan or Slip Spielfogel[4a] and Samuel Koyner,[5] three criminals then serving time in States Prison.

The indictment is as follows:

> "The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder in the First Degree, committed as follows:
>
> The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased,[6] wilfully, feloniously and of malice aforethought, shot and killed Leon Fox, with a pistol" (Rec., p. 11).

[4] Yellin was serving a term of from 10 to 20 years, for a "stick-up", convicted December 12, 1941 (Rec., p. 221).

[4a] Spielfogel, as a second offender was under sentence of from 30 to 60 years, for complicity in the same "hold-up" in which Yellin was convicted (Rec., pp. 295, 246).

[5] Koyner was serving a term of from 15 to 30 years for a "stick-up" committed December 15th, 1940 (Rec., p. 679).

[6] Beitler was dead at the time of the trial (Rec., pp. 679-681).

The only testimony against the petitioner Rudish, was given by Yellin and Spielfogel (Rec., pp. 221-288; 295-447).

The incriminating testimony consisted very largely of conversations alleged to have been had between Beitler, Yellin and Indovino; Beitler, Indovino and Kovner; Malinski and Spielfogel; and Rudish, Spielfogel and Yellin. The conversations related largely to the planning of the robbery, and those between Rudish and Yellin, and Rudish and Spielfogel as to Rudish's alleged participation in the affair —all of such conversations having occurred immediately prior, or subsequent, to the homicide (Rec., pp. 221-228; 315-320).

The witness Yellin was held to be an accomplice as a matter of law (Rec., p. 1347).

The Court of Appeals divided, four to three, on whether Spielfogel was an accomplice. The majority of the Court held that whether he was an accomplice was properly submitted to the jury as a question of fact (292 N. Y. 360, at 376); the minority insisted that the evidence established him to be an accomplice as a matter of law, or if not, that the evidence overwhelmingly proved him to be so as a matter of fact (292 N. Y. 360, at 380).

If Spielfogel were an accomplice, Rudish's conviction could not stand, since in New York State a conviction cannot be had upon the uncorroborated testimony of an accomplice.[7]

Circumstances Under Which Confession Obtained

The testimony established that on October 23, 1942, Morris Malinski was living with his family at 714 Hinsdale Street, Brooklyn, N. Y. (Rec., pp. 548; 945). He left his

[7] Section 399 of the New York Code of Criminal Procedure provides that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

home shortly after 7 A. M. that morning to proceed to work. When he had gone a short distance, he was accosted by two men who put pistols to his head. He was handcuffed, taken to an automobile, placed in it and driven away. He asked if he were being kidnapped and told to keep still. He was driven to the Bossert Hotel, in Brooklyn, a distance of five or six miles. During the drive a number of police stations, police headquarters, the County Court of Kings County, and the office of the District Attorney of Kings County were all passed. No stop was made. The Hotel Bossert was reached at eight o'clock and Malinski was immediately taken to a room where Lieut. McNally was present. Malinski was immediately stripped naked. (Rec. p. 574).[5]

After being stripped naked at the Bossert Hotel he was kept that way for a while, and then given his BVD's. Later he was given a blanket. The testimony is conflicting as to the length of time he remained undressed (R. 587-588, 607; 595-596); but one officer attached to the district attorney's office, testified that he was still in his stripped condition when he returned to the room in the Bossert Hotel at 3:00 A. M. Saturday morning, October 24th (R. 595-596). The reason assigned by the police for stripping Malinski was to ascertain whether there were any bullet wounds or scars on his body (R. 584), although the homicide had been effected twenty months previously (R. 11-12). What was found on examining Malinski's body was evidence of twenty-one skin graftings on his chest and abdomen, necessitated by severe burns when he was a child (R. 551, 596).

Malinski also testified that while he was still stripped

[5] Malinski claims by force; the police say he undressed voluntarily (Rec., pp. 549; 574; 595; 605-606).

Under cross-examination Lieut. McNally was asked:

"Q. Did you immediately commence interrogating the defendant Malinski? A. I stripped him first.

Q. Did you then interrogate him? A. I did." (Rec. 574.)

he was taken to an open window, his clothes placed on the window sill and that the police threatened to throw him out the window (R. 551). This was denied by the police (R. 572).

As soon as Malinski was brought to the hotel, Lieut. McNally 'phoned Edward Heffernan, an assistant district attorney, who had been working on the case with the police. Malinski testified that during the afternoon, Heffernan came to the hotel and questioned him about the Fox killing and left in disgust because Malinski denied all knowledge of the affair (R. 550). Lieutenant McNally testified that Heffernan came to the room where Malinski was, was told who he was, looked at him and walked out without speaking to him (R. 576). Another highly improbable story—that the public prosecutor, notified of the arrest of a suspect in a murder case on which he was working, merely looked at the suspect and did not question him at the earliest opportunity. Although Heffernan was present in the court room at the trial he was not called as a witness (R. 325-326). Malinski claimed that the police had beaten him from time to time during the day, Friday, October 23, 1941 (R. 549, 551, 555, 557-558). The police denied it (R. 572, 592, 604, 615). Some time in the course of the day, about 5 or 6 o'clock in the afternoon, it is claimed that Malinski made a full confession (R. 576). No transcript was made of any such confession; nor was any attempt made to prove the details of it. Later in the evening, about 9 o'clock, Malinski was questioned in the presence of the Acting District Attorney, Thomas Craddock Hughes, Assistant District Attorney Heffernan, Captain McGowan, head of the Homicide Bureau of the Police Department; Captain Dowdell, and Lieutenant McNally. No record was made of any statements made at that time by Malinski. None of the persons mentioned as being present at that time, ever denied his

presence or that what Malinski testified had occurred there had never happened (R. 851). Nor did any of them testify to any of the details of the confession which it is contended Malinski made at that time. The following day, Saturday, October 24, 1942, Malinski complained of illness and asked for a doctor (R. 562). His request was refused (R. 563). He also requested permission to see a Rabbi, and an assistant district attorney named Nat Math; both requests were refused (R. 322, 1254). Some sort of medicine or drug was given to him by one of the police officers to alleviate the stomach condition of which he complained (R. 596). He was questioned all day Saturday and into the night. The following day (October 25, 1942) he was questioned further and eventually taken to a police garage. It is claimed by the People that he there identified the car which had been used in the affair. He denied doing so, and his conduct substantiates his claim.[2]

He was questioned further and at length on that and on the following Monday, when he was taken to the scene of the crime (R. 644). All of this time he was held *incommunicado* in the Bossert Hotel. When Lieut. McNally was asked why, if the police had a complete confession at about five or six o'clock on Friday, October 23rd, that Malinski had participated in the brutal killing of a fellow member of the police department, he was not locked up in jail, McNally answered that Malinski had remained at the hotel of his own volition. That he was given the choice of going to jail or remaining at the hotel, and he chose to remain at the hotel with his "pal," Spielfogel, although Spielfogel

[2] He was asked to open one of the doors of an automobile claimed to have been the one used. He took his handkerchief from his pocket and grasped the handle with his handkerchief, asking at the same time whether the police were trying to "frame" him by inducing him to do something which would leave his finger prints on the car (R. 949-959).

was locked up in jail every night (R. 580-581), while Malinski was kept *incommunicado* in the hotel.

On Monday, the 26th, Malinski was questioned further and was taken in an automobile over the route alleged to have been followed by the killers to the scene of the crime. He was accompanied by detectives and Spielfogel.[10] The People contend that he voluntarily described the actions of the participants, preceding the killing and during the "stick-up" during which the homicide was effected. Malinski contends that the information furnished by him was given him by Spielfogel from time to time. That they conversed in Yiddish and that Spielfogel continually urged him to give the answers he suggested, as by so doing Malinski would avoid further ill treatment. About three o'clock in the afternoon of October 26, 1942, the party arrived at the Bath Beach or 62nd Precinct, station house. Malinski was questioned off and on until 2:10 A. M., October 27, 1942, when a statement then made by him as a result of questioning by Assistant District Attorney Heffernan, was taken by a stenographer, and later transcribed (R. 552-553, 579).[11] Then about 5:30 or 5:45 A. M., Tuesday morning, October 27, 1942, after having been held *incommunicado* from 7:15 A. M. of October 23, 1942, your petitioner, Malinski, was booked, or for nally placed under arrest by having a charge entered against him.[12]

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[10] Evidently the alleged "full confessions" were unsatisfactory and so the questioning was continued until one was obtained which met the requirements of the police.

[11] No explanation was ever given for taking Spielfogel on the trip.

[12] "The defendant must, in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night." (N. Y. Code of Criminal Procedure, Sec. 165).

Section 1844 of the Penal Law (N. Y.), provides that "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

"If, as appears plain, they did 'arrest' the defendant Malinski, then his confinement by the police at the Hotel Bossert, or any other place, without prompt arraignment was contrary to the express command of the statute and was unlawful." (Opinion of Chief Judge Lehman, p. 382).

Lieut. McNally testified that Malinski was arrested Tuesday morning, October 27, 1942 (R. 580, 587), although he was taken into custody and held *incommunicado* from Friday morning October 23, 1942, until the 27th when McNally claims he was arrested.[13]

During the trial, Malinski testified in his own behalf and denied emphatically that the admissions in the alleged confession were true, or that he had participated in any manner whatsoever in the robbery and killing (R. 955, 956, 961).

In addition to the oppressive conduct of the police and prosecuting officers, there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment. For instance during the final address of the assistant district attorney remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial. There is no dispute as to their indefensible character. All the Judges of the Court of Appeals are in agreement as to their objectionable character. Their impropriety was a denial of that

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In *People* v. *Mummiani* (258 N.Y. 394, 399), it was said:

"The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time (Code of Crim. Proc., Sec. 167). The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter."

[13] "Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a Magistrate or 'booked,' until October 27 (R. 586-587). During this time he was in the custody of police officers at the Hotel Bossert, Brooklyn." (Brief in Opposition to petition for certiorari, p. 18).

fundamental concept of justice and fairness that are essential to a fair and impartial trial imperative under the Fourteenth Amendment. The remarks and their impropriety are full set forth and discussed hereinafter (post pp. 19, 20, 22).

As to Rudish

"The conviction of Rudish," said Chief Judge Lehman, in the dissenting opinion, "thus rests upon the testimony of two witnesses who are accomplices by the great weight of evidence. The Trial Judge charged that 'no other evidence' corroborates them. The verdict against Rudish should for that reason be set aside" (*Peo.* v. *Malinski*, 292 N. Y. 360, 380).

That statement evidences how vital to Rudish was the admission of evidence harmful to him. After proceedings on the *voir dire* to determine whether the alleged written confession of Malinski should be admitted and submitted to the jury, the Court decided to admit the confession. After some discussion, the Court directed that certain names should be deleted and in their places the designations "X" and "Y" be used (R. 618-620).

In the alleged confession, Malinski involved both Rudish and Indovino, and it was those names which the Court directed should be suppressed and for which "X" and "Y" should be substituted. The device was futile. As soon as Malinski was called to testify in his own behalf, a few questions by his counsel developed that "X" and "Y" were respectively Rudish and Indovino (R. 953, 962). As said in *Anderson* v. *United States*, Vol. 87, Law Ad. Op. 589, 592.

> "The government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose

credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. *To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners.*" (Italics ours.)

However, as appears from the Record (p. 589) before Rudish and Indovino had been taken into custody the assistant District Attorney had introduced their names and gotten the fact before the jury that Malinski had implicated them.

"By Mr. McGough:

Q. On the day, (October 23) he (Malinski) finally told you at 5:30, had you apprehended Indovino and Rudish? A. No, sir.

Q. Were you or your men during that interval of three days working on the apprehension of those men? A. Yes.

* * * * * * *

Q. In other words, you were continuing your investigation; yes or no? A. Yes, sir."

The entire case emphasizes that Malinski's confession was fatal to Rudish. The indictment charged that Malinski, Rudish, Indovino and Beitler, then deceased, acting in concert, had killed Fox. In his opening address the District Attorney asserted that Malinski, Rudish and Beitler were at the scene of the crime; Indovino was not—he was the tipster. That Beitler thereafter had committed suicide. When Malinski's alleged confession was put in evidence with Rudish's and Indovino's names replaced by "X" and "Y", even without anything further it was inevitable that the jury should surmise that "X" and "Y" could only mean Rudish and Indovino. The case against all of the de-

fendants was interminably interwoven and connected, so that any evidence against any one of them, whether or not competent against the others, must necessarily have influenced the jury unfavorably against them. It is absurd to contend that merely because Rudish made no confession he has no standing here. If the confession of Malinski was a denial to him of due process, it is equally incompetent and as vitally disastrous to Rudish.

The only testimony against Rudish was given by Yellin and Spielfogel. Yellin was held to be an accomplice as a matter of law (*ante*, p. 5); the Court of Appeals divided sharply by four to three as to the status of Spielfogel (*ante*, p. 5). Spielfogel was under severe attack as to whether he had been an actual participant in the crime. The confession of Malinski must have had tremendous influence with the jury in determining Rudish's guilt. If it were wrongfully admitted, the conviction of Rudish should not be permitted to stand.

Argument

One question involved herein is whether the confession of Malinski, on the 27th day of October, 1942, was made under such circumstances as to render it inadmissible under the applicable decisions of this Court, and the due process clause of the Fourteenth Amendment. It is the confession taken on October 27th, by a stenographer at 2:10 A. M. at the Bath Beach station house and his identification of the murder car and his description at the scene of the murder with which this Court alone is concerned. While there is testimony that Malinski had made "complete confessions" prior thereto, no attempt was made to prove that Malinski said when the alleged "complete confessions" were made, and there is no evidence of any admissions made by him at any other time after his apprehension on October 23, 1942, and his detention *incommunicado* in the Hotel Bos-

sert from which to predicate a conclusion that he had confessed; nor was any effort made to prove any admission by him which would constitute a confession.

In the language of this Court in *Brown* v. *Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of commission or mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial."

Whether the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over the defendants' objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal.

Lyons v. *Oklahoma*, 88 S. C. L. ed. 1076.
Bram v. *United States*, 168 U. S. 532, 533, 540-42.
c/f *Stromberg* v. *California*, 283 U. S. 359, 367, 368.
Williams v. *North Carolina*, 317 U. S. 287, 291, 292.

Such being the well settled rule of this Court, no attempt will be made to analyze the other evidence in the record, nor will any answer be made to the elaborate argument in the Brief in opposition to the petition for the writ of certiorari, that such other evidence establishes the petitioners' guilt regardless of the confession. If the confession was improperly admitted and a constitutional right denied, the Court will not attempt to evaluate the effect of the confession.

While there is a conflict in the testimony as to whether Malinski was beaten while in custody to procure a confession, there are certain conceded and undisputed facts which clearly and conclusively establish that the confession was extorted as the result of coercion, duress and illegal acts and conduct by the police and prosecuting officers.

It is not denied that Malinski was assaulted by two individuals, subsequently identified as police officers, about 7:15 A. M. on October 23, 1942, immediately after leaving his home, where he was living with his family, and on his way to work. Two strangers "jumped" him, put pistols to his head, put handcuffs on him, told him to keep silent, when he asked if he were being kidnapped, put him into a private automobile and drove away from the vicinity of his home. It is not only not denied, but it is conceded, that he was taken to a private hotel, immediately stripped naked and kept wholly unclothed, and later partially clothed for a considerable time. It is admitted that numerous (21) skin graftings were found on his chest and abdomen. The testimony is contradictory as to whether he was beaten while in custody, and whether the police threatened, while he was partially dressed, to throw him out of a window. It is conceded that he complained of illness and asked for a doctor and none was furnished. It is conceded that he asked to see a Rabbi and an assistant district attorney, and that his requests were denied. It is admitted that he was held *incommunicado* from the time of his arrest at 7:15 A. M., on October 23, until 5:30 A. M. on October 27—a period of four days; that during the time of his detention he was continuously questioned, day and night, by police officials and representatives of the district attorney's office, and that at 2:10 A. M. on the 27th of October, he was questioned; that the questions and his answers then put to him were taken by a stenographer, and that he was then "booked" and formally placed under arrest at 5:30 or 5:45 A. M., practically four days after being taken into custody.

The purpose of these proceedings is not a matter of conjecture or speculation. There is neither dispute nor controversy as to the underlying motive of the police and the public prosecutor, and the result sought.

What more conclusive evidence that the confession was the result of coercion and induced by threats could be furnished than the admission of the People. In the Brief in Opposition to the petition for certiorari it is said (p. 27):

> "Malinski says he was beaten; the police deny that; *the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.*" (Emphasis supplied.)

Could the author of that admission have had in mind what was said in *Peo.* v. *Pantano*, 239 N. Y. 416, at 419; that

> "A threat may be implied as well as expressed and the fear engendered is alike in each case?"

What other conclusion is possible from the established and conceded facts than that stated in the dissenting opinion of Chief Judge Lehman, wherein he says:

> "Nonetheless, (p. 387) in this case, as in People v. Mummiani (258 N. Y. 399, 400), 'the conclusion is inescapable' that the police delayed the arraignment of the defendant for the purpose of subjecting him to inquisition impossible thereafter at which time he might be induced to make a confession by resort to what the Supreme Court of the United States has described as those reprehensible practices known as the 'third degree, which, though universally rejected as indefensible, still find their way into use.'"

The mere recital of the facts set forth herein should suffice to establish that the confession was the result of coercion and duress, and was not voluntary.

In the Brief in opposition to the petition for certiorari there is a brazen attempt to justify this illegal conduct of the police. At page 18 thereof is the following:

> "Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a

Magistrate of 'booked' until October 27 (R. 586-587). During this time he was in the custody of police officers at the Bossert Hotel, Brooklyn. He was kept there with his consent. According to Detective McNally, Malinski, when he was asked whether he preferred to remain there, instead of being lodged in a police cell, said his preference was the hotel. Also, according to McNally, when at five-thirty o'clock on the afternoon of the day of his arrest, Malinski, admitted his part in the killing, neither Indovino nor Rudish had been apprehended (R. 589). That this is so, is borne out by the testimony of Indovino that he was arrested on October 24 (R. 672), and of Rudish that he was arrested on the same day (R. 672).

During the interval of three days following Malinski's admission of guilt and his confession to assistant district attorney Heffernan, on October 27, the police officers were continuing their investigation of the case (R. 589). That is not an unreasonable explanation of the police officers' delay in arraigning Malinski. Particularly, it is not unreasonable if it was true that Malinski acquiesced in being kept at a hotel instead of being placed in a cell.

'In the absence of justification the detention for almost thirty-six hours was illegal and though the illegality does not require the inference that the confession obtained was involuntary, yet it has a substantial bearing upon that disputed question (People v. Alex., 265 N. Y. 192).'

Justification here appears. Of what avail would the information supplied to them by Malinski have been to the police if prompt arraignment followed disclosures of the afternoon of October 23, and his guilty partners were put on warning and thus allowed to escape?''

The following sentence, in that excerpt, is highly significant: ''Particularly, it is not unreasonable if it was true that Malinski acquiesed in being kept at a hotel instead of being placed in a cell.''

Is it possible to conceive that any one in possession of his mental faculties, in custody and charged with a heinous crime, having any hesitation in choosing whether to remain in a hotel or being put in jail? It was Lieut. McNally's plainly false and preposterous excuse for his failure to put Malinski in jail after he had allegedly admitted participation in the murder of Officer Fox. Malinski, said McNally, preferred to remain at the hotel to be with his pal, Spielfogel. Yet Spielfogel was locked up in jail every night. Was there ever such solicitation by the police towards an allegedly self-confessed murderer of one of their own members?

Unquestionably the assigned reason was false. Its falsity is shown by what occurred. Malinski was questioned on Friday night, after his alleged confession that day about 5:30 or 6:00 P. M., all day Saturday, Sunday and Monday until he finally made the confession stenographically recorded at 2:30 A. M., October 27, 1944. The real and sole purpose of keeping Malinski at the hotel, instead of putting him in jail, was to permit continued questioning while he was held *incommunicado* and to permit the application of coercive pressure until a satisfactory "confession" was extorted. As the District Attorney said in his summation, "They hold men for several days. * * * They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and to sue out writs" (R. 1254). In the Brief in opposition to the petition for certiorari it is said (p. 18): "During the interval of three days following Malinski's admission of guilty and his confession to assistant district attorney Heffernan, on October 27, the police officers were continuing their investigation of the case." The statement is too naive. Only those still living in chidhood's innocence could possibly be misled by such reasoning. If Malinski had made a full confession at 5:30 or 6:00 P. M., on the 23rd of October, why the incessant

questioning thereafter till 2:30 A. M., October 27th. The conclusion is inevitable—there was no complete confession October 23rd, and the questioning was persisted in, without cessation, until one satisfactory to the police was coerced at 2:00 A. M., October 27th.

> "We are loathe to believe that the police did actually act as the Assistant District Attorney says they did. We certainly cannot say that they did do so, and we should not hesitate to reverse a judgment which is the result of a trial at which a jury was led to believe that such practices were lawful and proper." (Ch. J. Lehman, 392 N. Y. at 389.)

The petitioners, however, do not rely alone upon the foregoing narrative of events to sustain their contention that there was a flagrant denial of constitutional rights.

In his summation, the district attorney said:

> "Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, *let him think he is going to get a shellacking*" (R. 1283). (Italics supplied.)

In what plainer terms could an admission be couched that the practices to which the police had resorted were solely to produce such a mental state as to induce the defendant to make any statement desired so as to be relieved of the pressure? And does not such a frank admission of coercion tend rather to strengthen Malinski's claim that he was subjected to physical abuse as well as to mental terror?

In *Lyons* v. *Oklahoma*, 88 Law Ed. Adv. Op. 1076 at 1079, it is said:

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the

> accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime." (Ashcraft v. State of Tennessee, 321 U. S. —; Hysler v. Florida, 315 U. S. 411, 413.)

The People (in the Brief in O to P for C. p. 21) argue that:

> "Malinski was possessed of 'mental freedom' at the time he made his oral confession. That he was deprived of it, later, when he made his official confession it is impossible, from all of the circumstances to believe."

Again it is emphasized that there is no evidence of an "oral" confession. It has been said that Malinski made a "complete" confession about 5:30 or 6:00 P. M. October 23rd. The assertion is a mere conclusion. No attempt was made to prove the details—to show what he said. Not satisfied with what was said at that time, the police continued their persistent questioning until 2:30 A. M. October 27th when the confession desired was stenographically recorded. It may be impossible for a prosecutor to believe that Malinski had not by then been deprived of his "mental freedom"; it would be difficult to find anyone else so naive as not to be certain that he acted under duress.

Again, the district attorney said (R. 1254):

> "Malinski was held and he was allowed to sleep there.[14] He could not get away. When McNally was asked, 'did you place him under arrest?', he probably meant he did not book him right away. They hold men for several days.[15] Are you satisfied with that? They are not going to let him go home, or let him get hold

[14] Referring to Malinski's detention at the Hotel Bossert.

[15] Such action is in violation of the New York Stature § 165 of the Code of Criminal Procedure, *ante*, p. 10.

> of a smart mouthpiece to preach about his rights and to sue out writs. You want a district attorney in this county that is worth his salt, not a powder puff district attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say: 'Do you want anything? Do you want to have your lawyer, or your wife, or somebody else?' In fact after that they would not let him see Mr. Math, an assistant in our office; they would not let him talk to a Rabbi. Do you think that McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business?"

In view of the long and historical struggle to establish and protect fundamental rights which are sacred to Anglo-Saxon civilization can a more shocking and incredible statement be imagined?

Commenting upon the foregoing and other passages in the District Attorney's summation, Judge Conway, in the prevailing opinion (292 N. Y. 360, 373), said:

> "The remarks were indefensible."

A further excerpt is as follows:

> "Just imagine! Down there on that bleak winter's night, Patrolman Fox trying to do his duty in the face of these hoodlums who were out there in Coney Island from the lower east side of Manhattan, *where your life is not worth a pretzel.*" (Rec. p. 1258). (Emphasis ours.)

It is a notorious fact of common knowledge, that in the region of the City of New York, usually referred to as the lower "East Side", there are hundreds of thousands of Jewish people. They are decent, thrifty, industrious, law-abiding and patriotic. Of course some of the residents of that section at times commit crimes and are in conflict with law.

It is not an uncommon thing for attempts to be made to create the impression that all of the inhabitants of the lower East Side are criminals, and because of their *race and religious beliefs* are an undesirable element of the community. The whole tenor of the "indefensible" remarks of the assistant district attorney was a brazen appeal to racial and religious prejudices, highly detrimental to these defendants—both of whom are Hebrews—designed to have the jury convict defendants because of their race rather than on the evidence.

This insidious appeal to racial prejudice was not a spontaneous utterance made in the excitement of an overzealous summation. It was deliberate and carefully planned and shrewdly calculated to implant the poisonous seed in the jury's minds. That such was the fact is clearly indicated by another excerpt from the summation:

> "Killing", he said speaking of Malinski "a patrolman in the dead of winter and coming back and saying 'that donkey went down like a ton of bricks!' I guess he thought he hit a *Sullivan* or *McCarthy*, or *McGough*, or something * * *" (Rec. p. 1276). (Italics supplied.)

Could anything be clearer? Could there be any misunderstanding of what was meant? Could the poison have been more skillfully injected? Could the conduct have been more dastardly?

The Court was in agreement as to the outrageous and inexcusable character of the assistant district attorney's statements.

The majority took the position that although counsel had interrupted the summation a number of times, that they were so little impressed by the offensive character of the remarks, they made no objection to them. Chief Judge Lehman pointed out, however, that exception was taken by motion for a mistrial. Under the practice in New York

State, in a capital case it is not essential for review by the Court of Appeals that an exception be taken. The Court has power to reverse for error, whether any objection be made or exception be taken.[16] But the question was not, as Judge Conway seemed to assume, whether the remarks were such as to impress counsel with their impropriety. The important question is, were they harmful to the defendants? If they were, no exception was needed. It was the duty of the Court to give such relief to the defendants as the situation required; if they were not harmful an exception was futile.

The situation recalls the poignant words of Goldsmith.[17]

"When lovely woman stoops to folly,
And finds too late that men betray;
What charm can cure her melancholy?
What art can wash her guilt away?

Moreover it is difficult to follow the reasoning of the majority of the Court. It certainly does not conform to any recognized system of logic. Indeed it seems to illuminate Herbert Spencer's comment upon the seeming incongruity between Tristian Shandy's father's argumentative powers and ignorance of formal logic.[18] After referring to the remarks of the District Attorney quoted in Chief Judge Lehman's dissenting opinion, and characterizing them as "indefensible" Judge Conway concluded that "*the effect of the utterances, it seems to us, would inure to the benefit of Malinski rather than against him* and they did not relate to Rudish or Indovino." (Emphasis supplied.)

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[16] Section 528 of the New York Code of Criminal Procedure is in part as follows: "• • • When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below."

[17] She Stoops to Conquer, Chap. 5, Song Stanza I.

[18] Philosophy of Style (1852).

In all sacred and profane literature there is but one pertinent passage from Robert Burns that constitutes a cogent answer to that specious reasoning:

> "Oh! Wad some power the giftie gie us
> Tae see oursel's as ithers see us.
> It would frae many a trouble free us
> An foolish notions.
> What airs in speech and gait wad lea us
> An e'en devotion."

In the Brief in opposition to petition for certiorari an attempt is made to sustain the Court's reasoning. At p. 27 is the following:

> "The only reason we have referred to Counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the 'indefensible statements', is that it is fair, sound argument on Judge Conway's part when he says it seemed to the majority of the Court that the district attorney's utterances would inure to the benefit of Malinski rather than against him."

The Brief then set forth grounds upon which it asserted it was proper to base the conclusion that the "indefensible" remarks inured to Malinski's benefit.

> "If", it is said, "the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the confession was obtained" (p. 27).

It is submitted that if the "scales were evenly balanced" the jury could not have been convinced beyond a reasonable doubt that the confession was voluntary and must therefore have disregarded it. The reason assigned, how-

ever, far from supporting the reasoning by which the conclusion that the "indefensible" remarks were beneficial rather than harmful, is but another admission that the police had by inexcusable methods coerced Malinski to confess.

Duty of Trial Court

Moreover, the Trial Court was not without responsibility in the premises. It was under an obligation to act. The trial judge is not supposed to act the Sphinx. His duty is not passive—it is affirmative. He is there not only to preside, but to see that the trial is conducted fairly and impartially and in accordance with the fundamental concepts of fairness and justice. This Court, in *Viereck* against *United States*, 87 Law Ed. 529, commenting upon certain remarks of the prosecuting attorney said:

> "In his closing remarks to the jury, he—the prosecuting attorney—indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overruled, as coming too late, petitioner's objection first made in the course of the Court's charge to the jury. * * * We think the trial judge should have stopped counsel's discourse, without waiting for an objection."

In *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 316, 318, the following appears:

> "The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

In *People* v. *Wolf*, 183 N. Y. 464, 472:

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice, and casts grave responsibility not only upon the prosecuting offi-

> cers but also upon the trial judge. * * * we have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule, but our admonitions have not always been regarded, although they were followed by reversal of the judgment involved, founded solely on the remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."

Cf.

People v. *Esposito*, 220 N. Y., 370;
People v. *Manganaro*, 218 N. Y., 9, 17;
People v. *Mull*, 167 N. Y., 247;
People v. *Fielding*, 158 N. Y., 542.

In *People* v. *Conrow*, 200 N. Y., 356, 369, considerable adverse testimony had been elicited in the cross-examination of the defendant and subsequently stricken out by the Trial Court. The Court of Appeals said:

> "It is not always an easy thing for a juryman to eliminate from his memory the effect of damaging statements made in his presence. * * * In this case, where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result."

The Trial Court did not interrupt the District Attorney at any time during his "indefensible" remarks, nor did he at any time or in any manner point out in his charge the objectionable and inexcusable character of them, and advise the jury to disregard them and not to be influenced by them. Whatever prejudicial impression the remarks may have made upon the jury no attempt was made to eradicate the improper impression by the one whose duty it was to prevent such results.

This Court has emphatically and in no unmistaken terms condemned such conduct by the prosecuting attorney.

In *Berger* v. *U. S.*, 295 U. S. 78, 88, Mr. Justice Sutherland, speaking for the Court, said:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

This language was quoted with approval in *Viereck* v. *U. S. supra.*

Again, let us quote from the remarks of the district attorney:

> "Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner; let him *think he is going to get a shellacking.*" (Italics ours.) (Rec., p. 1283.)

As said in *People* v. *Pantano*, 239 N. Y. 416, 419:

> "A threat may be implied as well as expressed and the fear engendered is alike in each case."

The assistant district attorney frankly boasted that the procedure adopted was intended to instill a belief that

physical force was to be applied to Malinski. Under the circumstances, the mental condition resulting was the same as if the force were actually used. While there is contradictory testimony as to whether physical force was actually applied, there is no dispute that the procedure followed, as intended to have the same effect.

The People in their Brief, heretofore mentioned, (p. 27) quote from *United States* v. *Mitchell*, 322 U. S. 65, to support their contention that Malinski's confession was voluntary. The very excerpt quoted, however, supports the petitioner's contentions. The Court pointed out that Mitchell had consented to a search of his home and made a prompt acknowledgment of his guilt. He was then detained eight days before being arraigned before a magistrate. "Undoubtedly his detention during this period was illegal." But the acknowledgment of guilt was not made as a result of the detention, nor at the conclusion of it. He made his admissions before there was any illegal detention. "But in any event," said the Court, "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, as we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a primitive measure against unrelated wrongdoing by the police."

That is not the case at bar. The very reverse happened here. The detention was continuous and lasted until the confession was obtained; the detention was illegal; the confession was coerced; the People and used the fruit of the wrong-doing by the police. Using the confession so obtained violated the petitioners' Constitutional rights.

The Defendants Having Seasonably Asserted That Their Constitutional Rights Have Been Denied Resulting in a Judgment of Death, This Court Is Required to Make An Independent Examination to Ascertain Whether the Convictions Have Resulted From the Use of Confessions Improperly Obtained.

The petitioners have seasonably asserted their rights. The amended remittitur of the New York Court of Appeals sets forth that defendants' claim that they were denied due process of law under the Fourteenth Amendment was raised and necessarily passed upon by that *Court* (ante, p. 3).[19] The Record on appeal to the Court of Appeals discloses that the questions were raised on the trial in the Court below.

This being a capital case this Court is not bound by the finding of the Court, or the jury, or of both. It is under the solemn duty to make an independent investigation to determine the facts for itself.

In *Chambers* v. *Florida*, 309 U. S. 227, 228, it is said:

> "* * * use by a state court of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means prescribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained by review of the facts upon which that issue necessarily turns."

In *Lisenba* v. *California*, 314 U. S. 219, 240, it is said:

> "* * * we think it right to add that when a prisoner held incommunicado is subjected to questioning by

[19] 292 N. Y. 686.

> officers for long periods and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means."

In *Pierre* v. *Louisiana*, 306 U. S. 354, 358:

> "• • • when a claim is properly asserted • • • that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under the law rests."

In *Ward* v. *Texas*, 316 U. S. 547, 550, the Court said:

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when as in this case, the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft* v. *Tenn.*, 88 L. ed., Adv. Op., No. 14, 858, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

> "Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

Considering the circumstances under which Malinski's confession was obtained, as hereinbefore set forth, the law-

guage of this Court in *White* v. *Texas*, 310 U. S. 530, 533, is peculiarly pertinent:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

In *Betts* v. *Brady*, 316 U. S. 455, 462, it is said:

> "Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words in the Fourteenth Amendment. The phrase formulates a concept less rigid and more fluid than those envisaged in the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case."

In the instant case every device condemned by this Court as obnoxious to the Constitution were all employed to obtain Malinski's confession. Summarized they are: arrest without warrant; an assault with firearms; threats to keep silent; a spiriting away to a hotel, instead of a jail, during which numerous police stations, police headquarters, the County Court House and district attorney's office were passed; stripped naked, upon a flimsy pretext that it was desired to ascertain if there were bullet wounds or scars twenty months after the affray; held incommunicado from 7:15 A. M. October 23rd until 2:10 A. M. October 27th; repeatedly questioned day and night; denied medical attention when requested; denied opportunity to consult a Rabbi or an assistant district attorney, with the conceded purpose of preventing advice or assistance from friends and counsel—the only thing disputed being physical violence—mental coercion being conceded. What more could be done,

or must be done, to establish that a confession is involuntary?

To use Mr. Justice Holmes illuminating expression the petitioner was subjected to a pressure that can only be properly characterized as "hydraulic."

Northern Securities v. *United States*, 193 U. S., 197, 401.

As to Failure to Arraign Without Unnecessary Delay

In a note, page 9, *ante.*, Section 165, of the New York Code of Criminal Procedure, requiring a defendant to be taken before a Magistrate without unnecessary delay is set forth.

Somewhat similar statutes govern federal procedure.[20]

Arraignment of the defendant herein without "unnecessary delay" was a question of law to be determined by the Court. A jury may not speculate upon the motives of the police in failing to arraign promptly. There may be situations where there is unavoidable delay, i. e., inability to locate a magistrate or illness of the prisoner. It is a matter of common knowledge, however, that in the City of New York, magistrates are always available. They sit every day. Night courts are held by them. No issue was presented that magistrates were not available during the period of detention. The purpose of delaying arraignment in order to secure a satisfatcory confession was conceded. It was the duty of the Trial Court to advise the jury as a

[20] "It shall be the duty of the marshal, his deputy, or other officers, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner, or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail" (18 U. S. C. A., Sec. 595).

The Act of June 18, 1934, c. 595, 48 Stat. 1088; 5 U. S. C. A., sec. 300 A, authorizing officers of Federal Bureau of Investigations to make arrests, requires that, "the person arrested shall be immediately taken before a committing officer".

matter of law that the failure to arraign Malinski from the time of his arrest on October 23rd, until October 27th, was a flagrant violation of law. The Court did not do so.

The charge on that question is as follows (R. 1377):

> "* * * I charge you that it was the duty of the police to arraign the defendant before the nearest magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.
>
> But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made, was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession, if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach Station house.
>
> However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not, in and of itself, standing alone, destroy the validity of the confession. Is that clear?"

It is respectfully submitted that the charge was erroneous and grossly inadequate. It was not for the jury to speculate as to whether there had been "unnecessary delay," in the arraignment. The fact was so overwhelmingly established, that the jury should have been so advised. They should have been further instructed that such a flagrant violation of law on the part of the police must be seriously and carefully weighed in determining whether the confession of October 27th was voluntary. It should have been pointed out that only after repeated questioning, day and night, for four days, did the police obtain such a confession as they were willing to have transcribed. The jury

should have been told to consider well whether the delay in arraignment was to obtain the sort of confession desired and necessary to involve Malinski. As Chief Judge Lehman pointed out (*ante*, p. 16) that "the conclusion is inescapable that the police delayed the arraignment for the purpose of subjecting the defendant to inquisition thereafter impossible." Moreover, the charge minimizes the importance of a prompt araignment of a prisoner and must have been exceedingly misleading to the jury. As Chief Judge Lehman said (292 N. Y. 360, 387):

> "There can be no fair trial of the issue whether the confession is voluntary, where the jury is not properly informed that the detention was unlawful and they must take that fact into consideration. *That has not been done in this case.*
>
> It is true that in the charge of the Court, the jury was informed that 'it was the duty of the police to arraign the defendant before the nearest magistrate, without unnecessary delay, and further if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor', and 'that if you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach Station House.' That instruction is not sufficient where, as in this case, the evidence produced by the People, conclusively shows that the police flagrantly disobeyed the express mandate of the law. Even if there had been a question in this case, that the delay in arraignment was not 'unnecessary' within the meaning of Section 165 of the Code of Criminal Procedure, that question was not properly submitted to the jury." (Italics supplied.)

No clearer analysis of the circumstances under which the issue of whether the voluntary nature of the confession was adequately and properly submitted to the jury is possible.

The jury was never properly instructed on the applicable law. It was impossible to have an intelligent discussion and decision under the circumstances.

The entire tenor of the charge was apologetic. It sought to minimize the gross dereliction of duty on the part of the police. The soft peddling could not be but misleading to the jury. How could the jury fail to be impressed by the statement, "But, gentlemen, you will bear in mind that the police department is not on trial in this case?" Maybe not; but surely the conduct of members of the police department was a vital issue to be determined. That should have been made clear to the jury; they should not have been left to grope in a maze of uncertainty; they should not have been left to speculate as to whether there had been illegal delay; "illegality is illegality",[21] and good motives and pious intentions and excessive zeal do not make what is "illegal", legal.

Controlling Decisions

This case comes squarely within *Ashcraft* v. *Tenn., supra.* There is a striking similarity between them. It would serve no useful purpose to detail at length the facts established in the *Ashcraft* case. Suffice to say that there appeared to have been continuous questioning by experienced lawyers and police officials; that he was held *incommunicado* for thirty-six hours without sleep or rest. "The Constitution of the United States stands as a bar", said the Court, "against the conviction of any individual in an American Court by means of coercion".

The conceded and proven facts in the instant case hereinbefore specifically set forth, discloses a situation more flagrant and indefensible than that shown in the *Ashcraft* case. No novel rule is asserted by the petitioners. Their

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[21] *United States* v. *Mitchell*, 322 U. S. 65.

rights under the Constitution have been unlawfully invaded. They invoke its protecting aegis, that their lives may not be forfeit by such unconscionable and vicious practices as were indulged in herein.

In the instant case, as in the *Ashcraft* case, neither in the lower Court, nor in the Court of Appeals, was it actually "held as a matter of fact that petitioners' confessions were 'freely and voluntarily made.' "

> "The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were 'freely and voluntarily made.' The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it over-ruled Ashcraft's objection to the use of his alleged confession with the statement that, 'This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained.' And it likewise over-ruled Ware's objection to use of his alleged confession, stating that 'the reasonable minds of twelve men might • • • differ as to • • • whether Ware's confession was voluntary, and • • • therefore, that is a question of fact for the jury to pass on.'[22] Nor did the State Supreme Court review the evidence pertaining to the

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[22] The legal test applied by the trial court to determine the admissibility of the two confessions was stated thus:

"The Court has come to the conclusion • • • that the law in Tennessee with reference to confession is simply this; it is largely a question of fact as to whether or not a confession is voluntary, and is made without hope of reward or fear of punishment. It only becomes a question of law for the Court to decide when, from the facts surrounding the taking of the alleged confessions or statements, the Court, as a matter of law, can hold that the State has failed to carry its burden, which it has of showing that the confessions were free and voluntarily, and that reasonable minds could not differ, and could come to but one conclusion that the confessions were involuntary and forced."

confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, on Justice dissenting, it went no further than to point out that, 'The trial judge • • • held • • • he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury', and to declare that it, likewise, was 'unable to say that the confessions were not freely and voluntarily made'.[23]

If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury."

Proceeding to review further what happened in the State this Court said:

"This treatment of the confessions by the two State Courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of 'independent examination' of petitioners' claim which, in any event, we are bound to make. *Lisenba* v. *California*, 314 U. S. 219, 237-238. Our duty to make that examination could not have been 'foreclosed by the finding of a court or the verdict of a jury or both.'"

An examination of the circumstances under which Malinski's confession was obtained permits no conclusion other than it was involuntary. The facts have heretofore been reviewed. It is unnecessary to repeat them here. As Mr. Justice Murphy said in *Lyons* v. *Oklahoma*, *supra*, such "flagrant abuse by a State of the rights of an American

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[23] Notwithstanding the apparent fact that neither the trial court nor the appellate court affirmatively held the confessions voluntary, the Tennessee Supreme Court, in its opinion, restated the rule it had announced in previous cases, that, "When confessions are offered as evidence, their competency becomes a preliminary question, to be determined by the Court • • • (If) the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed." (See Self v. State, 65 Tenn. 244, 253).

citizen accused of murder ought not to be approved." If the scales of justice are to be held even, it cannot be upheld.

McNabb v. *United States* 87 Law. Ed. 579 strikingly resembles the instant case.

The defendants therein were arrested by officers of the Bureau of Internal Revenue, on suspicion of having murdered on officer of that agency, but were not taken before a committing magistrate, as required by Federal statute, 28 Stat. 416 (1894); 18 U. S. C., sec. 595 (1940). After being kept *incommunicado* for several days, and questioned intermittently, they confessed to the murder. The District Court ruled at the trial, that the confessions were voluntary and admissible, and a conviction of second degree murder resulted largely because of the confessions. The Circuit Court of Appeals affirmed; the Supreme Court granted *certiorari* and reversed the convictions on the ground that confessions elicited from he accused while in illegal custody, under the circumstances disclosed, were inadmissible, whether voluntary or otherwise.

There are some remarkable coincidences in the facts in that case and the *instant* one. The defendants were questioned by a number of officers; no friends or counsel were present; one was stripped to ascertain if he had been injured going through the woods at the scene of the affair and greatly frightened as a result (p. 582).

It was pointed out (p. 583) that a conviction in the Federal Courts, cannot stand if it be based on evidence illegally obtained (see authorities cited). That the Court had, on constitutional grounds, set aside convictions, both in the Federal State Courts, which were based upon evidence "secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the powers of

officers were magnified" (authorities cited, p. 584). At page 585, the Court said:

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatments of the petitioners, the arresting officers assumed functions which Congress has explicitly denied them. *They subjected the accused to the pressure of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the government, and which tends to undermine the integrity of criminal proceedings*" (emphasis supplied, p. 585).

Reference is then made to the Federal statutes similar to Section 165 of the Code of Criminal Procedure and continues:

> "The purpose of this impressively persuasive requirement of criminal procedure is plain. A democratic society in which respect for the dignity of all men is central naturally guards against the misuses of the law enforcement process. Zeal in tracking down crim- is not, in itself, an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the danger of the overzealous as well as the despotic * * *. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons constitutes and important safeguard—not only in assuring protection for the innocent, *but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.* For this procedural requirement checks resort to reprehensible practices known as the 'third degree', which though universally rejected as indefensible, still find their way into use" (emphasis supplied, p. 586).

After summarizing the arrest and the detention and quizzing of the defendants, the Court continues:

> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded, cannot be allowed to stand without making the *Courts themselves accomplices in wilful disobedience of law.*"

Vide, also:

> *Anderson* v. *United States*, Law. Ed. Adv. Opinions, Vol. 87, No. 10, page 589.

Surely this Court cannot permit itself to be put in the category of an accomplice of those guilty of the atrocious violation of law which the record herein discloses.

In *United States* v. *Mitchell*, 88 L. ed., Adv. Op., No. 13, 812,815 (decided April 24, 1944), Mr. Justice Reed said:

> "As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. * * * In my view, detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made, without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threat, it has no weight as proper proof of guilt."

While it is recognized that the rule in the *McNabb* case, *supra*, thus interpreted applies only to cases in the Federal Courts, and the power to review cases in State Courts, is more restricted and limited (*McNabb* v. *United States*,

supra), yet the petitioners herein contend that there is here both conceded illegal detention and coercion and duress of the most flagrant character.

Other decisions that support petitioners' contentions are:

Ward v. *Texas*, 316 U. S., 547;
Lisenba v. *California*, 314 U. S., 219;
Chambers v. *Florida*, 309 U. S., 227;
White v. *Texas*, 310 U. S., 530;
Vernon v. *Alabama*, 313 U. S., 547;
Lomax v. *Texas*, 313 U. S., 544;
Canty v. *Alabama*, 309 U. S., 629;
Brown v. *Mississippi*, 297 U. S., 278;
Pierre v. *Louisiana*, 306 U. S., 354;
Betts v. *Brady*, 316 U. S., 455;
Lyons v. *Oklahoma*, 88 L. Ed., Adv. Op., No. 16 1076.

The facts herein come within the principles enumerated therein. In none are the facts so conclusive as herein. Even in those of the above cited authorities where the decision has been adverse to the petitioners, the applied rule compels a required favorable conclusion herein.

Nothing is to be gained by a detailed recital of the circumstances of the foregoing decisions. Unusual circumstances, not present in the instant case, have compelled conclusions that would be illogical and inconsistent upon the established facts in the case under review.

But when there is shown to have existed such facts as were established herein but one conclusion is logical and just.

As said in the Report of the Committee on Lawless enforcement of Law, Amer. Journal of Police Science, p. 587; "Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police chief"—we have it here; "the use of the third degree is

obnoxious because it is secret; because the prisoner is wholly unrepresented"—we have it here; "because there is present no neutral, impartial authority to determine questions between the police and the prisoner"—we have it here; "because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner"—we have that situation here. And when it is considered how little information was furnished either by the police or the district attorney as to what transpired outside of continued questioning of Malinski during his detention incommunicado from 7:30 A. M. October 23rd until 2:00 A. M. October 27, it needs no extraordinary degree of intelligence, merely ordinary experience, to picture what Malinski must have undergone during his incarceration.

Conclusion

The fact of the killing of the deceased by the defendants in a capital case in the State of New York, must be proved beyond a reasonable doubt.[24]

Three of the seven judges of the Court of Appeals voted to reverse the conviction of both petitioners. The reasons for their position were set forth cogently and in detail in Chief Judge Lehman's opinion. It emphasized that there was failure to protect petitioners' right to a fair trial.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."[25]

Three judges of the Court of Appeals so concluded. The proven facts more than justify their conclusion. At no time

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[24] N. Y. Penal Law, Section 1041—Appendix, *post*, p. 48.
[25] Lisenba v. California, 314 U. S. 219, 236.

in our history has it been more important for the Courts to stand fast in safeguarding our liberties. The fundamental rights, which the founders, so carefully outlined and protected should not be evaded by a desire to accomplish something worthwhile. The punishment of the murderers of Leon Fox is a praiseworthy task. If the efforts be successful, it should not be at the expense, or in violation, of precious rights. With present world-wide chaotic conditions, the inclination to take short cuts to do so-called justice is ever pressing. The existing War undoubtedly has among its important objectives the preservation of our Anglo-Saxon civilization, with the recognition of man's natural rights to life, liberty and the pursuit of happiness, and the preservation of those institutions so Providentially devised to preserve them.

Let us repeat here and emphasize what was said previously:

> "Important it is indeed to punish crime; but far more imperative is it that our criminal procedure be not polluted with foreign methods, alien to our concept of justice and inconsistent with our system of government."

A calm and dispassionate examination of the record herein and of the circumstances under which Malinski's confession was procured, discloses a process abhorrent to those fundamental concepts of fairness and justice characteristic of our criminal procedure, and repellant to every element of impartiality.

As said by Ch. Judge Lehman in *People* v. *Roper*.[26]

> "'We may not 'sustain a conviction erroneously secured on one theory on the conjecture that it would have followed just the same if the correct theory had been applied'. (Hiscock, Ch. J. in People v. Smith, 232

[26] 259 N. Y. 170, 176.

N. Y. 239, 244). A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law."

The Court cannot ignore current world wide events. Or as has been so aptly said:

> "Courts cannot emulate the ostrich, and by hiding their heads pretend ignorance of current events of universal knowledge."

This nation is engaged in a titanic world-wide struggle. Its chief object is to destroy arbitrary and totalitarian governments, which arbitrarily deny ordinary natural rights, and to make the blessing of democracy secure for all the peoples of the world. Of what avail to sacrifice the flower of the youth of our country, to pour out unmeasurable treasure, to create burdens to be borne by many future generations to secure those objectives, if some of the more detestable phases of Nazism and Fascism are to be tolerated, even encouraged and approved in our own blessed land? Perish the thought! This sanctuary of freedom, liberty and democracy must be preserved inviolate. The one hope is this tribunal. Failure here, means disaster everywhere else.

To sustain the judgment of the Court of Appeals will be to deprive the petitioners of their lives without due process of law.

Respectfully Submitted,

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APPENDIX A

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

APPENDIX B

Judicial Code of the United States, Section 237 (b), as Amended, 28 U. S. C. A., Section 344 (b).

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right

is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

APPENDIX C

Section 165 of the Code of Criminal Procedure of the State of New York

The defendant must in all cases be taken before the magistrate without unnecessary delay.

APPENDIX D

Section 399 of the Code of Criminal Procedure of the State of New York

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

APPENDIX E

Section 1844 of the Penal Law of the State of New York

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such a person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

APPENDIX F

Section 528 of the Code of Criminal Procedure of the State of New York

When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below.

APPENDIX G

Section 595, United States Code of Criminal Procedure, Title 18, United States Code (1940 Ed., Vol. 2)

It shall be the duty of the Marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under the existing laws for a hearing, commitment, or taking bail for trial, • • •

APPENDIX H

Section 300 A of Title 5, United States Code (1940 Ed., Vol. 1, p. 124)

The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that

the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms.

APPENDIX I

Section 1041 New York Penal Law

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.